

COMMONWEALTH OF VIRGINIA

DELEGATE JOHN COSGROVE, Chair
SENATOR MAMIE LOCKE, Vice Chair
ELIZABETH A. PALEN, Executive Director



GENERAL ASSEMBLY BUILDING
910 CAPITOL STREET, SECOND FLOOR
RICHMOND, VIRGINIA 23219
(PHONE) 804-786-3591
(FAX) 804-371-0169
epalen@dls.virginia.gov
<http://dls.state.va.us/houscomm.htm>

VIRGINIA HOUSING COMMISSION

Meeting Summary

Mortgage Sub-Work Group 6th Floor Speaker's Conference Room, General Assembly Building November 15, 2011, 10:00 A.M.

I. Welcome and Call to Order

- Delegate Daniel Marshall, *Chair*
- The meeting was called to order at 10:00 a.m.

II. Mortgage Loan Originator Proposed Changes

- **Delegate Marshall** asked Joe Face, Commissioner of Financial Institutions at the Bureau of Financial Institutions of the Virginia State Corporation Commission (SCC), to explain existing legislation governing mortgage loan originators (MLOs) in Virginia and any changes that may be necessary to ensure the state's compliance with the SAFE Act.
- **Joe Face** noted that § 1504(a) of the SAFE Act requires the licensing of individuals who "engage in the business of" a MLO. HUD issued a final ruling on the SAFE Act over the summer that differentiated between individuals who meet the definition of a MLO, given the activities a MLO may perform, and individuals who "engage in the business of" a MLO. When the SAFE Act was enacted, and states, including Virginia, were enacting their own versions of the SAFE Act, there was virtually little guidance at the federal level as to exactly who was required to be licensed. In short, HUD's recent ruling says that every individual who acts as a MLO is not necessarily subject to the SAFE Act's licensing and registration requirements.
- **Joe Face** explained that Virginia's law varies from the SAFE Act and the model in that the Virginia licensing requirement for MLOs, found in § 6.2-1701 of the Virginia Code, does not contain the "engage in the business of" language that § 1504(a) of the SAFE Act uses. Section 6.2-1701 uses the phrase "act as" and HUD makes a clear distinction in its recent ruling between "engag[ing] in the business of" and "act[ing] as" a MLO. The SCC believes that HUD's exemption for employees of governmental agencies and certain bona fide non-profits cannot be extended to those employees acting as MLOs in connection with a Virginia residential mortgage loan, even in a governmental or charitable context. The question has arisen as to how many other states carve out exemptions for governmental agencies and non-

profit organizations. The SCC is not aware of any states that specifically exempt these entities; this is because the majority of states adopted legislation based on the Conference of State Bank Supervisors' model state law which mirrors the "engage in the business of" language of the SAFE Act. Thus, those states laws will be interpreted in the same manner that HUD has interpreted the SAFE Act.

- **Joe Face** explained that HUD's final SAFE Act rule clarifies the "engage in the business of" standard to mean loan origination activities performed in a commercial context with some degree of regularity or repetition. The SAFE Act does not apply to employees of governmental and housing finance agencies who act as MLOs in accordance with their duties as employees of those agencies. The SAFE Act does not apply to employees of bona fide non-profit organizations as defined by the HUD ruling. The remaining question is: what is a bona fide non-profit organization? States are required to adopt certain minimum standards that non-profits must meet before their employees can be declared exempt from MLO licensing.
- **Joe Face** suggested that this issue is a policy question that should be decided by the General Assembly. The proposed legislation would change the Virginia licensing requirement standard to "engage in the business of" to conform with the language of the SAFE Act. It would require the SCC to prescribe by regulation the procedures and criteria that it would use to determine whether an organization is a bona fide non-profit organization, and to give consideration to the criteria adopted by the Consumer Financial Protection Bureau (CFPB) or any other federal rulemaking authority under the SAFE Act when establishing this criteria. Finally, the bill allows the SCC to investigate the books, records, and activities of an organization to determine whether it meets the established criteria.
- **Maureen Stinger**, with the SCC, noted that the SCC submitted the initial draft of the bill to provide technical assistance, but as Commissioner Face suggested earlier, this is a policy question and the SCC is neither advancing nor rejecting this proposal.
 - The bill amends the definition of a MLO. The Act was originally drafted in 2009, and the existing definition excludes a number of individuals. Because of the nature of the new exemptions HUD has identified, the SCC decided to include these exemptions with all the other regulatory chapters in Title 6.2; those are being stricken at line 37 simply because they are being included elsewhere in the bill.
 - The date is stricken because it is no longer necessary. Subsection A has been added; this section currently has no subsections and is one paragraph. After "no individual shall," "act as" has been stricken and "engage in the business of" has been added. At line 74, "or hold himself out to the general public as a mortgage loan originator" has been stricken because that issue is already addressed in another section in Chapter 17.
 - The bill also adds subsection B, which lists exemptions. The exemptions are included in the definition of a MLO in the current act, they have simply been rewritten as specific exemptions in this bill for clarification purposes.

- Another paragraph of the bill addresses individuals who are not subject to the SAFE Act requirements because they do not engage in the business of a loan originator; Bill Shelton can expand on this issue.
- Another paragraph addresses what HUD has said about the exemption of employees of bona fide non-profit organizations from the requirement to be licensed as MLOs. HUD seemed to be concerned with situations where for-profit mortgage companies have formed non-profit organizations to issue mortgage loans and funnel borrowers to the for-profit entity, and avoid the SAFE Act licensure requirements. This new paragraph addresses this situation and the language is taken directly from the HUD ruling.
- The bill specifies requirements for the SCC in promulgating regulations regarding the criteria used to determine a bona fide non-profit organization. The criteria are established by HUD, which are not listed in this proposed legislation because enforcement of the SAFE Act has now fallen to the CFPB, and there may be changes to these criteria in the near future. The criteria that have been included in the bill illustrate the minimum standard.
- The bill requires the SCC to investigate and examine these organizations to ensure that they are and are continuing to be bona fide non-profit organizations.
- The bill also gives the SCC the authority to revoke the status of a bona fide non-profit organization.
- **Delegate Marshall** asked whether “bona fide” is defined by HUD.
 - **Maureen Stinger** answered that “bona fide” is not defined, but “bona fide non-profit organization” is partially defined. HUD says that for an organization to be considered a bona fide non-profit organization, it has to meet certain criteria. The criteria include (1) meeting the status of a tax-exempt organization under § 501(c)(3), which is an organization with a charitable purpose rather than any non-profit organization; (2) promoting affordable housing or provides homeownership education or similar services; (3) conducting activities in a manner that serves public or charitable purposes rather than commercial purposes; (4) receiving funding and revenue and charging fees in a manner that does not incentivize the organization or its employees to act other than in the best interests of the clients; (5) compensating its employees in a manner that does not incentivize the organization or its employees to act other than in the best interests of the clients; (6) providing or identifying for the borrower residential mortgage loans with terms favorable to the borrower and comparable to mortgage loans and housing assistance provided under government housing assistance programs. This criteria was not specifically included in the proposed legislation in anticipation that they might change.
- **Bill Shelton**, the Executive Director at the Department of Housing and Community Development (DHCD), noted that this issue was discussed last year, but before HUD issued its final ruling the impact on Virginia remained uncertain.
 - The effect of the Virginia legislation was that any governmental entity, including housing authorities were made to ensure licensure of their MLOs. Since DHCD does not originate loans, it was relatively unaffected, however,

it does work with local government and non-profits that qualify as §501(c)(3) organizations. The Virginia Housing Development Authority (VHDA) contracts MLOs but also engages in the activity of a MLO. MLOs at VHDA became licensed in order to remain operational. DHCD provides a variety of assistance, including payment assistance. In order for payment assistance to be treated as a grant rather than a loan even though there are conditions that recipients must meet to avoid repayment, DHCD had to obtain an interpretation letter from the SCC, and did so in order to comply with the statute. Any other agency, including programs that provided similar payment assistance under very favorable terms to the borrower, also had to obtain a similar letter. Although some programs were able to, many either reverted back to providing grants rather than loans, or had to contract with a loan originator who was licensed, which was a complicated arrangement. The effect on agencies and non-profit organizations that were trying to find ways to continue to provide loan assistance was an inefficient system.

- The intention of the SAFE Act is to differentiate between loan originators who were providing loans under favorable terms for the borrower and those who were taking advantage of the borrower's situation. Another problem for agencies and non-profit organizations was that they were subject to the same licensure requirements as a full-time MLO even though they typically only originate about half a dozen loans per year. Many agencies and organizations therefore chose not to obtain licenses, resulting in an interruption of commerce in the affordable housing field. The Virginia statute swept up a broader audience than it perhaps originally intended.
- Although Virginia is not necessarily non-compliant with the SAFE Act if programs continue to operate this way, a more narrowly defined definition of who must be licensed would help to facilitate affordable housing in the commonwealth.
- **Randy Cook**, with the Virginia Association of Housing and Community Development (VAHCD), agreed that the existing language of the statute created obstacles and additional costs in licensing loan originators to comply with the Act. VAHCD would be covered by paragraph 10 of the proposed legislation, and being exempted from licensure would contribute to a more efficient process.
- **Alexander Macaulay**, representing Citigroup, asked Ms. Stinger if the "act as" standard is narrower than the "engage in the business of" standard.
 - **Maureen Stinger** responded that what is being narrowed is the pool of individuals who are required to be licensed. Government employees or employees of bona fide non-profit organizations will no longer be required to be licensed as MLOs.
- **Alexander Macaulay** pointed out that the statute licenses MLOs, who are the actual people who interact with borrowers, but the license requirement speaks more to the activities performed by the MLO; he suggested that this could result in unintended consequences.
 - **Maureen Stinger** replied that the bill defines a MLO as a person, but a person who does one of two things: he either takes an application for a

residential mortgage loan, or offers or negotiates the terms of a residential mortgage loan. Whether or not a person qualifies as a MLO is determined by the activity in which he is involved. The federal act actually uses “takes an application *and* offers or negotiates,” which makes the Virginia standard stricter than the federal standard.

- **Alexander Macaulay** asked Ms. Stinger to further explain what direction HUD has given for the “in the business of” piece of the requirement.
 - **Maureen Stinger** answered that HUD thoroughly identifies what “engage in the business of” means; it then defines it, and sets forth in an appendix who does not engage in the business of a MLO. The SCC is obligated to interpret laws in conjunction with federal law where Virginia law is silent or doesn’t specify as much as the federal law, and this is why the non-profit organizations and government agencies are experiencing difficulty.
- **Alexander Macaulay** pointed out that “engage in the business of” is not a defined term in the statute.
 - **Maureen Stinger** responded that the SCC has identified a number of terms that HUD has defined that the SCC plans to propose for adoption during the regulatory process, including “taking an application,” and “residential mortgage loan.” If the General Assembly chooses to adopt the “engage in the business of” standard that would be another defined term. The SCC has no objection if the legislature would prefer those terms to be defined in the statute, but the SCC does intend to adopt all of those terms. The SCC has the authority to promulgate regulations elsewhere in Chapter 17.
- **Senator Watkins** asked Joe Face if an application or filing fee would be required for agencies and non-profit organizations to file for exemption under the statute.
 - **Joe Face** answered that he was unsure at this point whether any fee will be required. If the SCC does not have to charge anything it certainly will not. There will not be a large volume of exemption filing since there are relatively few agencies and organizations that will be exempt from licensing.
 - **Maureen Stinger** pointed out that national non-profit organizations, such as Habitat for Humanity, will want bona fide non-profit organization status in all of the states in which they operate. In Virginia, there will probably be a substantial number of these organizations and the process will probably be fairly streamlined since the HUD requirements will be the same.
 - **Joe Face** added that he does not anticipate that it will be difficult for the SCC to determine whether an organization is bona fide, and if there is an issue the SCC has the authority to make the final determination through an on-site visit.
- **Senator Watkins** asked if the CFPB had taken over the enforcement of the SAFE Act from HUD yet.
 - **Joe Face** responded that it took over SAFE Act enforcement as of July 21, 2011. As a point of information, he mentioned that he has received the letter from the CFPB informing state banking agencies that it will not be making a definitive ruling on whether Virginia or any other state meets the requirements under the SAFE Act until after December 31, 2012.

- **Chip Dicks**, on behalf of Virginia Association of Realtors (VAR), mentioned that in the Mortgage Lender Act, there is a definition of mortgage loan that exempts self financing. Owner-financed mortgage loans are not mortgage loans per se, and VAR proposed a change to eliminate seller financing language from the definition of mortgage loan, and insert it in the exemptions section. This would allow owner-financed loans to remain exempt. This would help to clarify that owner-financing is exempt for real estate companies, and would not change the substantive provisions of the bill
- **Delegate Marshall** suggested that Mr. Dicks clarify the exemption for owner financing as a separate bill.
 - **Chip Dicks** agreed that such a provision is more appropriate in Chapter 16 rather than Chapter 17.

III. Public Comment

- There was no public comment.

IV. Adjourn

- The meeting was adjourned at 11:00 a.m.